Supreme Court, U.S.
FILED
DEC 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-521

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TRANSOIL (JERSEY) LTD. AND
TRANSOIL (U.S.A.), INC.,
Petitioners

v.

REX OIL, LTD. AND EMPIRE PETROLEUM
INTERNATIONAL, INC.,
Respondents

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

In November, 1985, respondent Empire Petroleum International, Inc., (hereinafter "EMPIRE"), subsequently joined by its joint venturer respondent Rex Oil, Ltd., (hereinafter "REX", jointly hereinafter "REX/EMPIRE")[1] and Transoil (U.S.A.), Ltd., and Transoil (Jersey), Ltd., (hereinafter collectively "TRANSOIL")[2] entered a contract for the

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[1] On November 20, 1989, the U.S. District Court for the Southern District of Texas directed intervention papers be filed in this matter by Joseph W. Rares, assignee of REX and/or REX/EMPIRE, and L. Burke Lewis, former counsel to REX/EMPIRE. By order signed December 6, 1989, the District Court allowed the intervention of Mr. Lewis, by whom the instant brief is submitted; a similar order relative to Mr. Rares is anticipated to be forthcoming. Also anticipated to intervene at some stage in the litigation below are ARCO, the purveyor, and Paktank Corporation, the storage facility. It is further anticipated that the combined interests of the present and anticipated intervenors will largely extinguish any financial interest(s) of REX/EMPIRE in this case.

[2] The District Court determined the two TRANSOIL entities to be alter egos of one another. Tr. 6/18/87, Pet. App'x at 28a-29a. No challenge was at any time made, before the District Court, the U.S. Court of Appeals for (Footnote Continued)

sale and purchase of approximately 80,000 barrels of a petroleum distillate product known as "luwa". The agreement called for 80,000 barrels of the luwa to be delivered by ARCO to Paktank Corporation (hereinafter "PAKTANK") storage tanks in Houston, Texas for subsequent shipboard loading. As required by the underlying contract with ARCO and the attendant letters of credit, TRANSOIL was to nominate an ocean-going vessel to transport all 80,000 barrels in a single "lift" and to secure payment with a letter of credit issued by Banque Paribas et des Pay-Bas ("Banque Paribas") in favor of REX/EMPIRE upon presentment of ocean bills of lading and warehouse receipts. 5th Cir. Op., Pet. App'x at 3a. Pursuant to Environmental Protection Agency

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(Footnote Continued)
the Fifth Circuit, or to this Court, to the accuracy of that finding. Accordingly, all references in this Opposition to the TRANSOIL defendants will be in the singular, i.e., "TRANSOIL".

regulations and prohibitions, the luwa could not be used in the United States and was required to be transported overseas for its ultimate commercial use. During December, 1985, certain disputes arose between EMPIRE and TRANSOIL relative to the transaction; those disputes were resolved and the agreement amended.

Pursuant to the terms of the amended agreement, TRANSOIL nominated a ship, the M/V JACINTH, to transport the luwa. The M/V JACINTH was, however, incapable of lifting more than 59,000 barrels and thus incapable of transporting the entire 80,000 bbl. shipment in a single "lift", as required by the terms of the contract between REX/EMPIRE and TRANSOIL. 5th Cir. Op., Pet. App'x at 4a. Fifty-nine thousand barrels of luwa were nonetheless erroneously loaded on the M/V JACINTH; despite EMPIRE demanding that the luwa be returned to its PAKTANK storage tanks, TRANSOIL refused to unload the cargo. Id.

On January 9, 1986, REX/EMPIRE filed a complaint, citing maritime tort, conversion and breach of a maritime contract, and obtained a Rule D, Supplemental Maritime Rules, Writ of Attachment, thereby effecting the arrest and seizure of the M/V JACINTH and its cargo of 59,000 barrels of luwa. On January 10, 1986, an emergency hearing was held before the Honorable Ross N. Sterling, U.S. District Judge, "the object of which was to return the Jacinth to commerce". Tr. 6/18/87 at 6, Pet. App'x at 23a; see also Tr. 1/10/86 at 6, Resp. App'x at 7a[3]. At that hearing, REX/EMPIRE and TRANSOIL reached an agreement, read into the record by counsel for TRANSOIL, consented to by counsel for the M/V JACINTH and PAKTANK, and made the order of the court, to "allow release of

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[3] The Petition omits the transcript of the January 10, 1986 proceeding. That transcript is reproduced in the Appendix to the within brief. See also n.5, below.

[the] vessel", the M/V JACINTH, Tr. 1/10/86 at 5, Resp. App'x at 6a, on the conditions (a) that TRANSOIL would nominate a vessel to lift an additional 80,000 barrels of luwa from PAKTANK by no later than January 31, 1986 and (b) "if Transoil is unable to nominate a ship which is able to lift the cargo by ... January 31, [1986,] that Empire will present warehouse receipts and receive full payment for the 80,000 barrels at $15.50 per barrel" on the above-described letter of credit. Id. at 3-4, Resp. App'x at 3a-4a. (The January 10, 1986 agreed order and maritime contract, as unanimously determined by the District Court and by the U.S. Court of Appeals for the Fifth Circuit, was later reduced to writing and signed and entered by the court on February 21, 1986. Pet. App'x at 42a-43a.) At no time before or during (a) the January 10, 1986 proceedings, (b) the entry of the January 10, 1986 agreed order

and maritime contract, (c) the entry of the February 21, 1986 written agreed order thereon, or (d) while TRANSOIL was receiving the benefits of the January 10, 1986 agreed order and maritime contract, did TRANSOIL ever contest the subject matter jurisdiction of the District Court.

Following the January 10, 1986 proceedings, TRANSOIL repeatedly breached the January 10, 1986 agreed order and maritime contract, requiring its reciprocal obligations for benefits received on January 10, 1986 as a result of the agreed order and maritime contract then entered, allowing the release of the M/V JACINTH. Specifically, on Friday, January 24, 1986, at 6:57 p.m., TRANSOIL purported to nominate the M/V SLETHAV to lift the luwa in Houston. However, the nomination violated not only TRANSOIL's own nominating procedures, but the procedures set forth in the January 10, 1986 agreed order and maritime contract.

See February 21, 1986 Agreed Order, Pet. App'x at 43a-44a. The M/V SLETHAV arrived in Houston on Saturday, January 25, 1986, but REX/EMPIRE had no notice of its arrival until Monday, January 27, 1986 at approximately 9:45 a.m., when REX/EMPIRE received a non-conforming "notice of readiness". The M/V SLETHAV departed at approximately 12:00 noon, Monday, January 27, 1986 without lifting the cargo. Upon the failure of TRANSOIL to nominate another vessel by January 31, 1986, pursuant to the terms of the January 10, 1986 agreed order and maritime contract, REX/EMPIRE presented negotiable warehouse receipts endorsed to Banque Paribas for full payment of the 80,000 barrels of luwa. As found by the district court, Banque Paribas, at the direction of its customer TRANSOIL, refused to pay REX/EMPIRE upon the presentment of the negotiable instruments. Tr. 6/18/87 at 9, Pet. App'x at 26a.

During April, 1986, REX/EMPIRE amended its complaint against TRANSOIL by supplemental pleadings to reflect the breach of the January 10, 1986 agreed order and maritime contract, rather than the maritime tort, conversion, and breach of maritime contract alleged in the initial complaint.[4] Judge Sterling conducted a trial on the amended complaint on April 8 and 10, 1987.[5] On June 18, 1987, Judge Sterling heard further argument and read into the record findings of fact, conclusions of law, and his intention to enter judgment in favor of

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[4] The pleading was denominated "amended" although, under a strict construction of Fed. R.Civ. P. 15(d), the complaint alleged facts and transactions occurring after the commencement of the action and is thus a supplemental pleading. The characterization of the pleading is immaterial. See n.13, infra.

[5] The amended complaint is not presented in the petition, thus presenting the startling spectacle of Petitioner having this Court review a judgment without benefit of the complaint upon which the judgment was based. The amended complaint is reproduced in the Appendix to this brief.

REX and EMPIRE. During that hearing, Judge Sterling determined the court had subject matter jurisdiction, holding that regardless of events prior to January 10, 1986, the salient fact was that on that date, the parties reached an agreement "the object of which was to return the Jacinth to commerce. It is my conviction that that agreement was a maritime contract." Tr. 6/18/87 at 6, Pet. App'x at 23a. Likewise, Judge Sterling, having witnessed the negotiations, "was in the best position to know the purpose of the agreement", 5th Cir. Op., Pet. App'x at 8a, and noted:

> "I'm saying the deal cut here on the night of January 10th is a maritime contract because it was for the release of the vessel. It's just the same as a bond, but there was an agreement and a stipulation for release and that is maritime."

Tr. 6/18/87 at 11, Pet. App'x at 28a.

Additionally, during that hearing, Judge Sterling "gave a fairly extensive

oral exposition of his perceptions about the case", 5th Cir. Op., Pet. App'x at 6a, including the nature of the contract, its terms, and the relationship of the TRANSOIL entities, TRANSOIL's breach of the January 10, 1986 agreed order and maritime contract, and damages thereon. Judge Sterling also indicated that he planned "to file detailed findings and conclusions". Tr. 6/18/87 at 23, Pet. App'x at 39a. Approximately eight months later, Judge Sterling died without filing such written findings and conclusions. On February 4, 1988, the Honorable John V. Singleton, Jr., U.S. District Judge, entered judgment against TRANSOIL in the amount of $702,400 plus pre- and post-judgment interest, based upon the findings and conclusions stated by Judge Sterling on June 18, 1987. Pet. App'x at 17a-18a.

Following the denial of TRANSOIL's motion for new trial, TRANSOIL took an

appeal to the U.S. Court of Appeals for the Fifth Circuit. TRANSOIL's appeal did not question the correctness, nor factual basis, of any of Judge Sterling's findings and did not attack the amount of damages. Instead, the issues raised by TRANSOIL before the Fifth Circuit were the same three issues presented in the instant petition. By opinion dated May 19, 1989, the Fifth Circuit held that admiralty jurisdiction was proper and that Judge Singleton correctly entered judgment against TRANSOIL in that Judge Sterling's June 18, 1987 findings and conclusions had been read into the record, transcribed, and were sufficiently detailed to satisfy Fed. R.Civ. P. 52(a).

ARGUMENT

I. The District Court and Court of Appeals Correctly Held That Admiralty Jurisdiction Was Created as a Result of the January 10, 1986 Agreed Order and Maritime Contract

There are four separate bases upon which the district court and the Fifth Circuit could have found admiralty

jurisdiction: (1) the breach by TRANSOIL of the maritime contract for the release of a vessel reached during the January 10, 1986 proceedings, (2) the violation by TRANSOIL of the agreed order on such maritime contract, (3) the breach of a maritime contract as alleged in the original complaint, or (4) a maritime tort committed by TRANSOIL as alleged in the original complaint. Any one of those grounds properly sustains admiralty jurisdiction. After extensive consideration, including review of post-trial memoranda and transcripts of the relevant proceedings, e.g., that of January 10, 1986, the district court found that the contract at issue during the trial was the January 10, 1986 maritime contract incorporating the agreed order thereon. The district court further found that the January 10, 1986 contract "was for the release of the vessel. It's just the same as a bond but there was an

agreement and a stipulation for release and that is maritime." Tr. 6/18/87 at 11, Pet. App'x at 28a. The Fifth Circuit unanimously affirmed that decision, noting that Judge Sterling "was in the best position to know the purpose of the agreement." 5th Cir. Op., Pet. App'x at 8a.

Present counsel for TRANSOIL posits to this Court that "[a]lthough the agreement had the incidental effect of releasing the vessel, the real purpose of the compromise was to amend the sales agreement". Pet. at 9. Such a conclusion is contrary to the contemporaneous statements made during the January 10, 1986 proceedings by the district court and each counsel, including then-counsel for TRANSOIL, who read the agreement into the record, including, for example, the following:

> "MS. TABOR [counsel for TRANSOIL]: ... That is the agreement which the ... plaintiffs and the Transoil

> defendants have entered into, Your Honor, and which would allow the release of vessel [sic] as soon as an order is entered by this Court."
> "THE COURT: Is there anyone who has any dispute with the announcement of the agreement which would release the vessel, as made by counsel? Is everyone in agreement with this?"
> [No objections stated by counsel].

Tr. 1/10/86 at 5, Resp. App'x at 5a-6a. See also id., at 6, Resp. App'x at 7a ("THE COURT ... "I just want to turn the vessel loose ... we can get the ship out of here, and that's what I think we are doing at this point."). Similarly: "THE COURT: ... The U.S. Marshal is hereby directed to release from arrest M/V Jacinth, wherever she may be found, her cargo, the bills of lading, the warehouse receipts and cargo in shore tanks 728 and 735 at Paktank, and further ordered that bills of lading be issued to Chesham." Tr. 1/10/86 at 11-12. See also Agreed Order, filed February 21, 1986, Pet. App'x at 43a.

Judge Sterling reaffirmed his view of the purpose of the January 10, 1986 proceedings during the June 18, 1987 hearing:

> "You [present counsel for TRANSOIL] weren't listening to what I was saying .... The parties agreed to release the vessel by these mutual promises, and if I didn't have jurisdiction we were all up here until ten o'clock at night and I was just a witness, but you worked out the deal .... "

Tr. 6/18/87, Pet. App'x at 27a.[6] Plainly, the district court's factual determination that the purpose of the January 10, 1986 agreed order and maritime contract was to release the vessel is a factual finding subject to the clearly erroneous standard of review. Fed. R.Civ. P. 52(a). TRANSOIL, through counsel who was not even present at the January 10,

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[6] Present counsel for Petitioner was neither in attendance nor counsel of record during the January 10, 1986 proceedings. That does not, of course, excuse ignorance of the fact that the purpose of this agreement was to release the vessel.

1986 proceedings, is hardly in a position to second-guess the statements, not only of its own counsel at those proceedings, but, of the judge who witnessed the negotiations and proceedings.[7]

The Fifth Circuit agreed:

> "Transoil entered into a settlement agreement on January 10, 1986, the effect of which was to release a sea-going vessel into commerce.
>
> * * *
>
> "Hence, Judge Sterling, who directly witnessed the negotiations between the parties, plainly found as a fact

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[7] Petitioner claims that "[t]he determination by Judge Sterling that the purpose of the contract was to release the vessel is not a finding of fact which restricts appellate review to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a)", Pet. at 9-10, yet also claims that "[a]lthough the agreement had the incidental effect of releasing the vessel, the real purpose of the compromise was to amend the sales agreement". Pet. at 9 (emphasis supplied). Petitioner does not explain either (a) how current counsel for TRANSOIL knows this to be so, to the exclusion of counsel in attendance at the January 10, 1986 proceedings, including TRANSOIL's then-counsel of record, all other counsel, Judge Sterling, and the panel on the Fifth Circuit, or (b) how it is that TRANSOIL knows this is so but argues that the district court's determination thereon was not a finding of fact within the meaning of Fed. R.Civ. P. 52(a).

> ... that the purpose of the agreement was to 'release the vessel by these mutual promises.' He was in the best position to know the purpose of the agreement, and we cannot say that his finding was clearly erroneous."

5th Cir. Op., Pet. App'x at 8a.[8] The Fifth Circuit so upholding the finding of admiralty jurisdiction is consistent with established and hornbook admiralty law:

> "It is difficult to imagine a contract more intimately 'connected with maritime transportation,' G. Gilmore & C. Black, The Law of Admiralty 21 (2d ed. 1975) (emphasis

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8 Petitioner asserts that:
"At the hearing on June 18, 1987, the Court determined that it had subject matter jurisdiction based on a maritime contract, that the Defendant breached the agreement of January 10, 1986, and the judgment would be entered in favor of Plaintiff."
Pet. at 5. By that obfuscating sentence structure, Petitioner would mislead this Court into believing that the "maritime contract" and the "agreement of January 10, 1986" are two separate and distinct creatures, when, in fact, they are one and the same. See 5th Cir. Op., App'x at 6a, 9a; see also Tr. 6/18/87, App'x at 26a ("THE COURT: ... [W]hat we are talking about is a breach of an agreement made on January 10th"); App'x at 28a ("THE COURT: I'm saying the deal cut here on the night of January 10th is a maritime contract because it was for the release of the vessel").

> omitted), than one whose performance will permit a vessel to continue on its chartered voyage."

Mefer S.A.R.L. of Paris v. Naviagro Maritime, 533 F. Supp. 337, 344 (S.D.N.Y. 1982) (emphasis omitted by Mefer court).

Likewise, it has long been established that "an admiralty court has jurisdiction to enforce its own judgments", including fraudulent transfers "aimed at evading a judgment entered in admiralty". Atlanta Shipping Corp., Inc. v. Chemical Bank, 818 F.2d 240, 248 (2d Cir. 1987), citing Lee v. Thompson, 15 F.Cas. 233 (C.C.D. La. 1878) (No. 8,202). Likewise, this Court has held that:

> "The basis of admiralty's power is to protect its jurisdiction from being thwarted by a fraudulent transfer, and that applies equally whether it is concerned with executing its judgment or authorizing an attachment to secure an independent maritime claim."

Swift & Company Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684,

694-95, 70 S.Ct. 861, 867-68, 92 L.Ed. 1206 (1950) (Frankfurter, J.).

Each of the several cases to which Petitioner cites where a court questioned subject matter jurisdiction involves the factual circumstances where no settlement took place, but the case proceeded to trial. Here, although the trial took place under the case designation as originally filed, the subject matter of that trial was the subject matter, not as set forth in the original complaint, but of the first amended complaint reflecting a breach of the January 10, 1986 agreed order and maritime contract which itself had resulted in the release of the M/V JACINTH.

While the original contract invoked maritime jurisdiction by allegations of a breach of a maritime contract[9] and

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[9] At issue in the original complaint were ocean bills of lading. Such "bills of lading incorporate maritime legislation and maritime terms. E.g., Carriage of Goods by Sea Act, 46 (Footnote Continued)

maritime tort[10], as stated by both the

(Footnote Continued)
U.S.C. §1300-1315" and thus render disputes relative thereto subject to admiralty jurisdiction. Puerto Rico Maritime Shipping Authority v. Luallipam, Inc., 631 F. Supp. 1472 (D.P.R. 1986). Likewise, " ... [i]n rem liability is justified for breaches of the contract of carriage ... [T]he shipowner 'cannot prevent, of course, the arising of the usual liens against his vessel, where these accrue because of cargo damage or nondelivery, even when he cannot be held personally liable.'" Cavcar Co. v. M/V Suzdal, 723 F.2d 1096, 1101 (3d Cir. 1983), citing G. Gilmore & C. Black, Jr., The Law of Admiralty §4-17 (2d ed. 1975).

10 Namely, the tort of conversion arising from TRANSOIL's refusal to return the subject cargo after it had been partially loaded on the M/V JACINTH, past the flange. Under Texas law, "[t]he wrongful detention of chattels under an assertion of right inconsistent with the owner's general dominion, particularly if the detention occurs after demand for possession, may constitute conversion. Stein v. Mauricio, 580 S.W.2d 82, 83 (1979); see also Kirby Exploration v. Mitchell Energy Corp., 701 S.W.2d 922, 924 (1985). "The reason for the exercise of admiralty jurisdiction is that conversion is a tort ... and if that tort is committed on navigable waters, admiralty has jurisdiction." The Lydia, 1 F.2d 18, 23 (2d Cir. 1924). Likewise under admiralty law, "[u]nder the locality test, the tort occurs 'where the alleged [tort] took effect,' rather than where the [tortious] act was done." Harville v. Johns-Manville Products Corp., 731 F.2d 775, 783 (11th Cir. 1984) (citations omitted). See also The Ferreri, 14 F. 589 (E.D.N.Y. 1882).

district court and court of appeals, the determination whether there was a maritime contract or maritime tort as alleged in the original complaint was a non-issue and irrelevant to the consideration of both the district court and Fifth Circuit. Tr. 6/18/87, Pet. App'x at 23a[11]; 5th Cir. Op., Pet. App'x at 8a.[12] The case was instead tried, not on the original allegations sounding in tort or contract, but on the supplemented/amended complaint

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11 "Even if I didn't have jurisdiction over the matter in the first place, there was an agreement among the parties which was arrived a through considerable discussions, not only among counsel, but counsel and the principals, the object of which was to return the Jacinth to commerce."
Tr. 6/18/87, Pet. App'x at 23a.

12 "It may well be that the district court here improperly issued the Rule D Writ of Attachment back on January 9, 1986. That question, however, is not before us because instead of litigating that issue ... Transoil entered into a settlement agreement on January 10, 1986, the effect of which was to release a sea-going vessel into commerce."
5th Cir. Op., Pet. App'x at 8a.

arising from the breach of the January 10, 1986 agreed order and maritime contract.[13] The suggestion by Petitioner that the Fifth Circuit "stops short of explicitly conceding the lack of jurisdiction ab initio, but does indicate that Petitioners' position may well be correct", Pet. at 9, simply misstates the thrust of the Fifth Circuit's reasoning. The Fifth Circuit, as did the District Court, held that the issue of whether there was jurisdiction on the original complaint was not a "crucial aspect" of the court's consideration in that the operative contract was the settlement agreement January 10, 1986, "the effect of which was to release a sea-going vessel into commerce." 5th Cir. Op., Pet. App'x

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13 As set forth above, n.4, the pleading was denominated "amended", although, under a strict construction of Fed. R.Civ. P. 15(d), it is a supplemental pleading. The characterization of the pleading is "immaterial to whether it may receive the correct relief it actually seeks, see Rule 1". Dan-Dee Imports, Inc. v. Well-Made Toy Mfg. Corp., 524 F. Supp. 615, 619 (E.D.N.Y. 1981).

at 12a, 8a. See also Tr. 6/18/87 at 9, Pet. App'x at 26a.[14]

By entering the January 10, 1986 settlement, the parties foreclosed the introduction of, and made irrelevant, evidence relative to the allegations of breach of maritime contract and maritime tort as originally alleged. Cia Anon Venezolana de Navegacion v. Harris, 374 F.2d 33, 35 (5th Cir. 1967). Accordingly, any evidence relating thereto was purely anecdotal and not comprehensive because all questions of liability and damages related solely to the breach of the

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[14] Even if jurisdiction did not exist at the commencement of the litigation, any such defect was cured at the time plaintiffs' amended or supplemented their pleadings to allege the breach of the January 10, 1986 agreed order and maritime contract. "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. §1653. See also Mathews v. Diaz, 426 U.S. 67, 75, 96 S.Ct. 1883, 1888, 48 L.Ed.2d 478 (1976); Wilson v. Westinghouse Electric Corp., 838 F.2d 286, 290 (8th Cir. 1988); Dan-Dee Imports, 524 F. Supp. at 619. See also nn. 9, 10, supra.

January 10, 1986 agreed order and maritime contract.

The principal remaining arguments raised by TRANSOIL on the issue of subject matter jurisdiction are straw men. First, TRANSOIL claims that by finding subject matter jurisdiction based upon the January 10, 1986 agreed order and maritime contract, the district court and the Fifth Circuit somehow permitted the collusive creation of jurisdiction. However, not only is there no suggestion of collusion or any lack of good faith belief in the court's jurisdiction relative to the complaint as originally filed, but the simple fact is, all maritime contracts create jurisdiction by agreement and there is nothing sinister about it. Quot erat demonstrandum. Parties who enter a maritime contract effectively agree that any disputes arising therefrom will be litigated in a federal (admiralty) forum.

Likewise, TRANSOIL attempts to create, but has not appealed, a factual dispute where there is none, by claiming that it "had the option of taking delivery on a ship". Pet. at 8 (emphasis in original). However, as set forth above, the terms of the contract required 80,000 bbls. of luwa to be transported in a single "lift" and the luwa could only be used, i.e., transported, overseas. Plainly, there is no "option". The only means by which such a quantity of luwa could be transported overseas was by ocean-going vessel.

The most compelling of reasons why this case is inappropriate for review by this Court, however, is contained in TRANSOIL's own petition:

> "[A] party confronted with an improper Rule D attachment may not reach a compromise to secure the release of property because that person runs the risk that, if a compromise is reached which allows a property to be released and has the additional effect of allowing the vessel upon which the property is placed to also

> be released, such compromise cures any jurisdictional defect."

Pet. at 10 (emphasis added.) How is it that a party will "run the risk" that by entering a settlement agreement, a jurisdictional defect will be waived? The very nature of settlement agreements, consistent with the well-established policy of encouraging settlements and resolving disputes, is that affirmative claims and defenses are waived. See Strange v. Gulf & Southern American Steamship Co., 495 F.2d 1235, 1237 (5th Cir. 1974). Startlingly, Petitioner asks this Court to exercise its valuable time and considered judgment for the special protection of a party who enters a settlement agreement with the secret intention not to perform its obligations thereunder!

This is not a case where TRANSOIL, by tendering the benefits back status quo ante, is moving to set aside a settlement

after obtaining benefits thereunder. Instead, following its failure to nominate a ship under the terms of the January 10, 1986 agreed order and maritime contract, TRANSOIL got possession of the luwa by holding the warehouse receipts, following REX/EMPIRE's presentment thereof, then instructed its bank not to pay on the letter of credit, Tr. 6/18/87 at 9, Pet. App'x at 26a, and now seeks approbation for its conduct from this Court. TRANSOIL has received all the benefits of the settlement agreement, but has refused to perform any of its obligations thereunder. By such a secret intention not to perform, a party properly invites not judicial protection of its action, but punishment thereon. See, e.g., Walling v. Beverly Enterprises, 476 F.2d 393, 396 & n.6 (9th Cir. 1973) ("'It has been the law under the mail fraud statute ever since the Supreme Court decision in 1896 [Durland v. United States, 161 U.S. 306, 16 S.Ct. 508,

40 L.Ed. 709] that "to promise what one does not mean to perform, or to declare an opinion as to future events which one does not hold, is a fraud."'" Citations omitted)

The established law of the federal appellate courts is that once a compromise agreed settlement is entered by the courts, it will be strictly enforced.

> "'To permit a party to accept the benefits of a settlement agreement, and then withdraw from that agreement without complying with its corresponding obligations, would subvert the settlement process.'"

EEOC v. Safeway Stores, Inc., 714 F.2d 567 (5th Cir. 1983) (citations omitted).

Likewise:

> "Federal courts have held under a great variety of circumstances that a settlement agreement once entered into cannot be repudiated by either party and will be summarily enforced' ... It is the very consequences of these uncertainties which the parties seek to foreclose by settlement and to take their chances on their outcome."

Strange, 495 F.2d at 1237 (citations

omitted, emphasis in original). Such considerations are especially true where the district court sits in admiralty and a defendant can sail off into the night, thus avoiding the practical effects of a judgment. See Atlanta Shipping, 818 F.2d at 248.

TRANSOIL does not now present any authority for the argument that its own bad faith in raising a claim it mooted by its entry into the January 10, 1986 agreed order and maritime contract (prior to or at which time TRANSOIL made no suggestion or claim of a lack of jurisdiction by the District Court) can somehow provide a basis for vitiating that solemn agreement. Thorough research on this issue reveals no position supporting TRANSOIL's proposition.[15]

---

15 Respondents posited this argument to the Fifth Circuit in their initial brief. Nowhere did Petitioner attempt -- on reply, during oral argument, or in the instant Petition -- to counter same.

Accordingly, the real question, as presented by Petitioner, is whether this Court wishes to establish as a matter of law and public policy that a party who enters a settlement and contract with the secret intention not to perform, but who obtains the benefit of that settlement and contract, should be accorded special ex post facto protection. Plainly, the facts of this case should hardly create the vehicle by which this Court would turn on its head established law recognized by this Court and every court of appeals that settlement agreements must be enforced.

II. The Findings of Fact and Conclusions of Law by Judge Sterling Complied with Fed. R.Civ. P. 52(a) and Were Sufficient for the Fifth Circuit to Make a Meaningful Review

Oral findings of fact and conclusions of law are specifically allowed under the plain terms of Fed. R.Civ. P. 52(a) which provides, in pertinent part:

> "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous .... It will

> be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court."

See also Mesa Petroleum Co. v. Coniglio, 787 F.2d 1484 (11th Cir. 1986). Likewise, this Court, in its own rules, anticipates that district court decisions may be given and reviewed upon oral findings of fact and conclusions of law, in requiring in an appendix to a petition for writ of certiorari, inter alia:

> "Copies of any opinions, orders, finding of fact, and conclusions of law, whether written or oral (if recorded and transcribed), delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed."

U.S.S.Ct.R. 31(k)(i). Accordingly, the Fifth Circuit was correct in holding that the issue was not whether there were written findings, but whether the oral findings were adequate and complied with

the standards of Fed. R.Civ. P. 52(a).

5th Cir. Op., Pet. App'x at 11a-12a.

> "The purpose of F.R.Civ.P. 52 is to afford the appellate court a clear understanding of the basis of the trial court's decision ... 'The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision.' ... Findings may be sufficient if they permit a clear understanding of the basis of decision of the trial court, irrespective of their mere form or arrangement.'
>
> * * *
>
> "Courts need not indulge in exegetics, or parse or declaim every fact and each nuance and hypothesis."

Gulf King Shrimp Company v. Wirtz, 407 F.2d 508, 515-516 (5th Cir. 1969) (citations omitted). See also United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 856 (9th Cir. 1983) ("Findings must be 'explicit enough to give the appellate court a clear understanding of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its

decision.'" Citations omitted). Similarly, "[i]t is well established that the trial court does not need to make specific findings on all facts but only must formulate findings on the ultimate facts necessary to reach a decision." Allied Van Lines, Inc. v. Small Business Administration, 667 F.2d 751, 753 (8th Cir. 1982).

The Fifth Circuit noted that Judge Sterling "gave a fairly extensive oral exposition of his perceptions of the case", covering the full range of significant issues before the District Court. 5th Cir. Op., Pet. App'x at 6a. The Fifth Circuit further noted that Judge Sterling "stated his reasoning with sufficient force and particularity for this court to understand them, to review them and to find that they were not clearly erroneous. Rule 52(a) does not require more." 5th Cir. Op., Pet. App'x at 12a. Significantly, however,

Petitioner raised only three issues on appeal to the Fifth Circuit, the same three that are presented to this Court, i.e., whether the District Court had subject matter jurisdiction, whether Judge Sterling's findings of fact and conclusions of law were sufficient, and whether the successor judge to Judge Sterling properly entered judgment. None of those three issues challenges the accuracy of the substance of Judge Sterling's findings of fact and conclusions of law, much less claims that any of Judge Sterling's factual findings were "clearly erroneous". Not before the Fifth Circuit, the District Court, or this Court has Petitioner ever challenged the accuracy of the factual findings by or the sufficiency of the evidence before the District Court. Likewise, Petitioner does not argue to this Court that the Fifth Circuit had an inadequate record before it to determine the bases upon which the

District Court reached its decision. Indeed, both the petition and the Fifth Circuit's opinion make plain that the Fifth Circuit did in fact have an adequate basis on which to review the District Court's findings and conclusions.

While Petitioner argues "[t]here were defenses raised by the defendants at trial which were not addressed by the court", Pet. at 13, Petitioner fails to specify a single example of those phantom defenses, much less any other erroneous finding or conclusion by the district court or the Fifth Circuit, other than the three issues described above. A lack of findings of fact and conclusions of law as to issues not appealed is not justiciable. See Firestone v. Aluminum Company of America, 235 F.2d 928, 930 (6th Cir. 1960) (trial court finding patent claim invalid did not reach question of patent infringement; accordingly, finding of infringement is obiter dictum and not presented on

appeal). Does it matter, for example, whether luwa is oil, a petroleum distillate or a chemical distillate?

Likewise, the issues of (a) the adequacy of the findings and conclusions and (b) the propriety of the entry of judgment by a successor judge, by their very nature, preclude consideration in the context of the discussion as to the adequacy of the district court's findings of fact and conclusions of law.

The only issue raised by TRANSOIL before the Fifth Circuit and this Court which in any way touches on the District Court's findings and conclusions is that of jurisdiction.

> "[T]here was an agreement among the parties which was arrived at through considerable discussion, not only among counsel, but counsel and the principals, the object of which was to return the Jacinth to commerce."

Tr. 6/18/87 at 6, Pet. App'x at 23a.

And,

> "I'm saying the deal cut here on the night of January 10th is a

> maritime contract because it was for the release of the vessel. It's just the same as a bond, but there was an agreement and a stipulation for release and that is maritime."

Tr. 6/18/87 at 11, Pet. App'x at 28a. Indeed, Petitioner does not even attempt to argue that Judge Sterling did not sufficiently set forth his reasoning on the question of subject matter jurisdiction, much less to present any specific argument as to the alleged errors in the district court's findings and conclusions preliminary to the ruling on jurisdiction. Petitioner argues instead only that the conclusion as to the existence of jurisdiction is in error as a matter of law.

Finally, Petitioner's Fed. R.Civ. P. 52(a) argument is specious not only because its complaints are not specified or otheriwse reviewed on appeal, but because the District Court made sufficient findings on the few "crucial aspects of

this case", namely, "the characterization of the agreement of January 10th as a maritime contract and the determination that Transoil breached it." 5th Cir. Op., Pet. App'x at 12a. As set forth supra, not even TRANSOIL makes any claim that the findings as to jurisdiction were inadequate. On the issue of the breach of the contract, the District Court properly found:

> " ... There were no quality representations other than there would be eighty thousand barrels of [luwa] delivered to Transoil and if Transoil didn't pick it up by January 31st that, Rex and Empire, could draw on the letter of credit on the basis of warehouse receipts. Your people ordered your bank not to do that, not to pay.

Tr. 6/18/87 at 9, Pet. App'x at 26a.

Likewise:

> "THE COURT: But it [the argument as to jurisdiction] goes out the window because you made a deal. You negotiated the price down. You sent a vessel six times too big then you sent one not big enough. Then after you cut the deal here at the courthouse as to how you were going to get the vessel away, you say okay we

> will take eighty thousand from wherever it comes as [luwa] and if we don't pick it up by the 31st, you can use your warehouse receipts and then you told the bank don't honor them."

Id., at 11, Pet. App'x at 28a. Neither before the Fifth Circuit nor in the instant petition has TRANSOIL claimed that it did not breach the January 10, 1986 maritime contract and agreed order.

The bulk of the remaining factual issues are either undisputed by the parties or have been uncontested by TRANSOIL on appeal. Significant in this regard, the subject contract was made and entered by the parties in open court. There is no factual dispute as to the contract price of $15.50 per barrel of luwa. Agreed Order filed February 21, 1986, para. 1(a), Pet. App'x at 43a. There is no factual dispute as to the contractual quantity of 80,000 barrels of luwa. Id. Judge Sterling determined that TRANSOIL, in exchange for receiving the

59,000 barrels of REX/EMPIRE's "tested and sealed" luwa on January 10, 1986 pursuant to the release of the M/V JACINTH, agreed to purchase an additional 80,000 barrels of luwa from REX/EMPIRE with no warranty of quality. Tr. 6/18/87 at 7, Pet. App'x at 24a. TRANSOIL at no time disputed that the cost to REX/EMPIRE of the 80,000 barrels of luwa provided to it by ARCO was $6.72 per barrel for a total of $537,000 ($6.72 x 80,000 = $537,000). Id. at 15, Pet. App'x at 32a. Nor did TRANSOIL dispute that the contract price is $1,240,000. ($15.50 per barrel x 80,000 = $1,240,000). Id.

Similarly, in finding that the TRANSOIL entities were but one and the same -- a finding never challenged by TRANSOIL -- the District Court's findings and conclusions were complete, specific, and clear:

> "Transoil Ltd. and Transoil U.S.A. are both owned by the same individual. Transoil, Jersey, is a foreign corporation

> which is based overseas and had a contract with station terminals for the blending of fuel oil.
> "Transoil U.S.A. is a company because of export restrictions the United States government, all exports from United States of these types of products had to be done in [a] United States company. The contract was made with Transoil U.S.A. or one of the Plaintiffs, and the financing of this agreement was provided by Transoil, Jersey. The ultimate receiver, Transoil, U.S.A. was to purchase the [luwa] and to sell it to Jersey down the line. Transoil, Jersey provided the financing, opened the letters of credit for the benefit of U.S.A., but didn't handle the financial aspects of the deal ....
> * * *
> "I think Transoil, Jersey and Transoil U.S.A., for the purpose of this lawsuit, are one and the same. U.S.A. is a straw man merely for the purpose of satisfying U.S. import and export regulations. They are one and the same.

Tr. 6/18/87 at 12-13, Pet. App'x at 28a-29a. Accordingly, the Fifth Circuit properly held that the District Court's findings of fact and conclusions of law sufficiently complied with Fed. R.Civ. P. 52(a).

For this Court to reverse the rulings of the Fifth Circuit and the District Court for a lack of findings of fact and conclusions of law on issues not in dispute and not raised on appeal is not only contrary to the purpose of Fed. R.Civ. P. 52(a), but would place an impossible administrative burden on the appellate courts -- the same policy considerations that dictate this Court accepting for review only a few of the petitions for certiorari submitted.

III. The Fifth Circuit Correctly Held that the Successor District Judge Properly Entered Judgment

The third and final issue presented by Petitioner may be dispensed with simply. Petitioner's argument that the successor judge acted improperly in entering judgment rises or falls on the determination of whether Judge Sterling issued findings of fact and conclusions of law. As set forth above, Judge Sterling's oral pronouncements on the few disputed

factual issues and even fewer issues challenged on appeal, were sufficiently detailed findings of fact and conclusions of law that provided ample basis not only for the successor judge to enter judgment, but for the Fifth Circuit to understand and review the basis for the District Court's determinations. Accordingly, the entry of judgment by the successor judge squarely fell within the scope of Fed. R.Civ. P. 63.

CONCLUSION

The decision by the Fifth Circuit on the issues of subject matter jurisdiction, the adequacy of the findings of fact and conclusions of law, and the propriety of entry of judgment by a successor judge is consistent with case law of the other circuits, applicable statutes, the Federal Rules of Civil Procedure, and well-established judicial policy

considerations. Accordingly, this action is inappropriate for review by certiorari.

Dated: December 15, 1989

Respectfully submitted,

LEWIS & COMPANY
LAWYERS

By: _____

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CERTIFICATE OF SERVICE

I, L. Burke Lewis, hereby certify that on this the 15th day of December, 1989, the foregoing Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served on all counsel of record herein in compliance with Supreme Court Rule 28.5(b), by enclosing three copies thereof in envelopes, with first-class postage thereon fully prepaid, and addressed as follows:

Thomas B. Greene, III
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3300 Two Houston Center
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Michael G. Shannon
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Henry H. McCreight, Jr., Esq.
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I caused such envelopes to be deposited in a regularly maintained U.S. Post Office box in Los Angeles, California.

I am a member of the bar of this Court. Executed this 15th day of December, 1989, at Malibu, California.

L. Burke Lewis

APPENDIX

APPENDIX A

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

REX OIL

CA-H-86-103
Houston, Texas
January 10, 1986
5:45 p.m.

V.

M/V JACINTH, ET AL.

Before: The Honorable Ross N. Sterling
United States District Court

APPEARANCES:

For the Plaintiff:
Mr. Jack Thetford
Mr. Robert Ryniker
3100 Edloe
Houston, TX 77027

For Defendant Transoil:
Ms. Tobi Tabor
2200 Texas Commerce Tower
Houston, Texas 77002

For Owner of Kosmos:
Ms. Nettie Van Heugten
3900 Texas Commerce Tower
Houston, TX 77002

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

[2]

For PakTank:
Mr. Michael Bell
1300 Post Oak
20th Floor, Allied Bank Tower
Houston, Texas 77056

For Kosmos Marine Corporation
& Belcher Oil Company:
Mr. George Haubenreich
Coastal Tower
Suite 834
Houston, Texas 77046

[3]

THE COURT: Please be seated. All right. We are discussing now civil action H-86-103, Rex Oil, Limited and Empire Petroleum, International versus the M/V Jacinth, et cetera, et cetera.

We have talked about this considerably in chambers. We are now in court, and someone please inform me what we are going to do next.

MS. TABOR: Yes, Your Honor. Tobi Tabor on behalf of the Transoil defendants named in this case. The plaintiffs and the Transoil defendants have reached an agreement with regard to--which affects

the release of the cargo which is at issue in this lawsuit, Your Honor, and I would like to read into the record the agreement which was made between those parties, and we then will ask the Court leave to file a stipulation containing the same terms, to be entered by the Court as an order.

THE COURT: Very good. If you would read that in the record then, yeah, I would appreciate that.

MS. TABOR: Yes, Your Honor. The letter of credit which has been opened for the plaintiffs will be amended to reflect the following changes: that Transoil will nominate a ship to lift 80,000 barrels of the cargo by January 31, 1986; that the price will be $15.50 per barrel; that if Transoil is not able to nominate a ship which is able to lift the cargo by the end of January, by January 31, that Empire will present

[4]

warehouse receipts and receive full

payment for the 80,000 barrels at $15.50 per barrel; that a current term in the letter of credit will be deleted, that is, the term referring to the tank numbers, and that as a substitution for that deleted term, the description of the cargo will be 80,000 barrels of luwa distillate blend stock. Those are all of those amendments to the letter of credit.

It has also been agreed among the parties, Your Honor, that those amendments will be--the amended letter of credit will be delivered to Dow Banking Corporation by 10:30 Eastern Standard Time on Monday, January 13, 1986.

In addition to that, the parties have entered into a separate agreement which will be presented to this Court as a stipulation with a request for entry, containing the following terms: The specifications of the product may vary within industry limits, but it shall be luwa distillate blend stock as produced by

Arco Chemical Company.

The second term is that Transoil agrees that no claim will be made against Empire or Rex on the basis that the material has a hazardous waste warning.

In exchange for those amendments and separate stipulation, Your Honor, the plaintiffs have agreed to dismissal of the in rem claims filed in this court. They have agreed to a release of the writ of attachment which is on the cargo. They have agreed to a release of the writ of

[5]

attachment which is on the bills of lading for that cargo so that the bills of lading can be issued as prepared to Chesham, and the parties have agreed to a preservation of the in personam cause of action which is on file with the Court.

Excuse me one moment, Your Honor. That is the agreement which the parties have--the plaintiffs and the Transoil defendants have entered into, Your Honor,

and which would allow release of vessel as soon as an order is entered by this Court.

THE COURT: Is there anyone who has any dispute with the announcement of the agreement which would release the vessel, as made by counsel? Is everyone in agreement with this?

MS. VAN HEUGTEN: Your Honor, Nettie Van Heugten for vessel interests. We have no objection to the agreement reached between the plaintiffs and Transoil. However, if the vessel is released, which we hardily endorse, we must also mention that the cargo will still be on board the vessel and will be discharged at St. Eustatius.

However, our costs will not have been covered in the form of--the bond is not going to be set. We will still then have a lien on the cargo in dispute, and we are afraid that unless we receive our costs at this time, we will be forced to exercise

that lien. We wanted to bring that to the Court's attention.

[6]

THE COURT: Well, does that cause any difficulty for you?

MS. TABOR: Your Honor, posting a bond on behalf of the vessel at this time causes difficulty because the vessel owners have a charter party with Belcher, which is not a party to this cause of action. They will recover their expenses from the charterer.

THE COURT: Yeah, they will have a lien. And my problem is that I don't want to impose any sort of bond requirement on the vessel. I just want to turn the vessel loose.

We have retained, from everything that you good people have said to me, the controversy over who owes what, but we can get the ship out of here, and that's what I think we are doing at this point.

MS. TABOR: Yes, sir.

MS. VAN HEUGTEN: Your Honor, excuse me.

MS. TABOR: I don't believe that any party is asking for a bond to be posted by the vessel. In fact, there is no bond issue involved except for the bond that the vessel is requesting.

THE COURT: Well, yeah. Of course, they have a lien on the cargo, and what happens to it--well, I say of course they would. I say that with great confidence just because somebody just told me that. But we can let the vessel go. The parties

[7]

who have involvement in this controversy are willing to do that, and we will simply have an in personam lawsuit about who owes what and to whom.

MS. TABOR: That's correct, Your Honor.

THE COURT: Now, that's what I was

hoping to achieve, and I want to tell all of you ladies and gentlemen how much I appreciate your diligence in working toward that aim and everything. At that goal.

MS. TABOR: Your Honor, excuse me, but I forgot to dictate into the record an additional agreement which was made between the plaintiffs and the Transoil defendants, and that is that there will be a release of the plaintiff's performance guarantee in the amount of $235,000. The Transoil defendants have agreed to release of that performance guarantee.

THE COURT: Well, I'm glad they have agreed, but tell me a little bit--what did they agree to perform? I would like to know a little bit more about it, although I certainly am going to endorse any agreement that you have made.

MR. THETFORD: Your Honor, Jack Thetford on behalf of the plaintiff. During the negotiations, the defendant,

Transoil, required the plaintiff to establish a performance bond to provide security in the event the plaintiff was unable to perform. The agreement at this point--

THE COURT: You mean to deliver the oil down there to the Caribbean.

[8]

MR. THETFORD: To deliver the oil to Transoil.

THE COURT: Okay.

MR. THETFORD: And at this point, the defendants Transoil have waived their right to collect under that bond.

THE COURT: All right.

MS. VAN HEUGTEN: Your Honor, if the vessel is going to be released, the vessel's agent is currently in possession of the bills of lading. We've prepared an order as the Court requested, for the release of the vessel, and we would merely like to request that the Court inform us to whom these bills of lading are to be

given, so that we can be sure to give that to the proper party.

MR. TABOR: Your Honor, the bills of lading should be issued to Chesham, C-h-e-s-h-a-m. It is my understanding that the bills of lading are already prepared to be issued to Chesham, and the proper name of the --the full name of Chesham is on the bills of lading at this point, so they just need to be issued.

THE COURT: Any problem with that?

MS. VAN HEUGTEN: If that is the case, Your Honor, there is absolutely no problem with it. We just wanted to have it clarified on the record that we will be giving those bills of lading to Chesham if they are so prepared.

THE COURT: To Chesham. Okay. Is there anything else that we need to put on the record? Is there anyone who has any

[9]

controversy, dispute of any kind with the things that we have talked about now?

MS. TABOR: No, Your Honor, I don't believe there is.

THE COURT: Do I need to sign anything in writing to release the vessel?

MS. TABOR: Yes, Your Honor.

THE COURT: Okay.

MR. THETFORD: Your Honor, in addition, we would ask your instructions as to how to locate a marshal so that we might get the vessel released.

THE COURT: Well, let's see. You look in the blue pages of the telephone book where it tells you about the marshal. To serve this?

MR. THETFORD: No, sir.

THE COURT: What do you need the marshal for?

MR. THETFORD: Your Honor, to release the marshal, we need to deliver to him a letter from the plaintiffs indicating that we have reached an agreement and ask that the vessel be released.

THE COURT: All right. Here is an order of the Court. It is ordered that the United States marshal is hereby directed to release from arrest M/V Jacinth, wherever she may be found, and further ordered that bills of lading be issued to Chesham, and done.

MR. THETFORD: If we can enter that order and somehow

[10]

get it in the hands of the marshal, that would be sufficient. The problem is it's after business hours.

THE COURT: That's right.

MR. HAUBENREICH: Your Honor, George Haubenreich.

THE COURT: I was thinking about endorsing on here that any grown person can serve this order.

MR. HAUBENREICH: Your Honor, George Haubenreich, counsel for Kosmos and Belcher, which is not a party to this

litigation, although has a definite interest.

THE COURT: What the heck are you doing here?

MR. HAUBENREICH: I just wanted to have it--sir, that order talks about releasing the vessel. It's not as broad as the agreement that has been read into the record, and I wouldn't want a misunderstanding of the marshal, because I believe the arrest order is for the cargo and other things.

I'm just raising that. We don't want to have a problem with the marshal who says he can release the vessel, however he still is under instructions and order to continue to have the cargo and other things under arrest.

MS. VAN HEUGTEN: Your Honor, we could very quickly revise the order to reflect that change to include release of the vessel and her cargo in its entirety, if

you would like us to revise the order that way.

THE COURT: Welll, is there somebody in this room who hasn't read this and agreed to it?

[11]

MS. VAN HEUGTEN: I don't believe so, Your Honor, but I believe --

THE COURT: --Who is a party to this matter?

MS. TABOR: No, sir. No, Your Honor. I don't believe that there is. However, it is a good point that has been raised, because there is more than the vessel that has--is under a writ of seizure at this time. And if I might--

THE COURT: Like what?

MS. TABOR: The bills of lading, the warehouse receipts and the cargo. And if I might take a minute and revise that order, I believe that it will more accurately reflect not only the agreement but what actually should be--

THE COURT: Okay. Let's do it. Let's do it.

Is the vessel prepared to sail?

MS. VAN HEUGTEN: Your Honor, the vessel was prepared to sail yesterday. I think at this point our problem is going to be getting tugs and pilots lined up. Other than that, it's my information the vessel is ready to sail.

THE COURT: My law clerk is going to go call the marshal's office and see if there is a duty officer there, and so maybe we can get somebody down here.

The U. S. Marshal is hereby directed to release from arrest M/V Jacinth, wherever she may be found, her cargo, the bills of lading, the warehouse receipts and cargo in shore tanks 728 and 735 at Paktank, and further ordered that bills of

[12]

lading be issued to Chesham.

MS. TABOR: Yes, Your Honor.

THE COURT: That meets everybody's problem?

MS. TABOR: Yes, Your Honor.

MS. VAN HEUGTEN: Yes, sir.

THE COURT: No bonds are necessary. We have an in personam case left.

MR. RYNIKER: That is correct, Your Honor.

MS. TABOR: Yes, Your Honor, and we will draft an order of dismissal preserving the in personam claims and dismissing the in rem claims.

THE COURT: Well, I don't think you have to do that necessarily. That's just another piece of paper. I just want to be sure we all understand what we've done, and mostly me. And this is--well, okay. It's still today, isn't it. This is the 10th, as I understand it.

MS. TABOR: Yes, Your Honor.

THE COURT: I can understand your concern of wanting this to be served by

the marshal. I'm not at all sure that's necessary.

MR. THETFORD: If I may, we need to serve that on the marshal is what we need to do. We need to get it in the hands of a marshal who will then inform the watchman on vessel.

THE COURT: Yeah, I understand that, but it's giving the master the authority to sail.

[13]

MR. THETFORD: Yes, sir, I understand that, but theoretically she is plastered in and her wheel is locked up, and there is an armed guard on the vessel, and if we can get a representative of the marshal's office to--

THE COURT: Yeah, that would be be better. I think that we could use any grown person to go and do that, but I would hesitate, under the circumstances, to do that. So let's just kind of sit at ease until we find out whether or not

there is a duty officer here so that we can get this to them. If not, I will go and call the United States Marshal at home and get this thing underway.

MS. TABOR: Thank you, Your Honor.

MS. VAN HEUGTEN: Thank you, Your Honor.

THE COURT: Well, I may be repeating myself, but again, I appreciate you all's efforts, and particularly on an evening of a weekend to stick around here and do this. It beats the heck out of coming down here tomorrow morning.

MR. THETFORD: Your Honor, we appreciate your hanging around, also.

THE COURT: Well, it beats the heck out of coming down here in the morning. I have done these things at home a time or two, but the dogs bark and they shed.

MR. CURRAN: Your Honor, my name is Petter Curran. I'm an attorney. I represent Chesham Trade Corporation, and I

understand we have had a hearing today. I'm a little late. I

[14]

apologize.

THE COURT: Well, it is very late. Tell me your name again.

MR. CURRAN: Peter Curran, C-u-r-r-a-n.

THE COURT: Mr. Curran, let's see here, and you represent--

MR. CURRAN: Chesham Trade Corporation. I am not a party to this action.

THE COURT: You are not a party to the suit?

MR. CURRAN: No, sir.

THE COURT: I have just signed an order, and let's see how this grabs you. It is ordered that the United States Marshal is hereby directed --and we are trying to find the marshal now--to release from arrest the M/V Jacinth wherever she may be found, her cargo, the bills of

lading, the warehouse receipts and cargo in shore tanks 728 and 735 at Paktank, and further ordered that bills of lading be issued to Chesham.

MR. CURRAN: Thank you, Your Honor.

THE COURT: And that was done the 10th day of January, 1986.

MR. CURRAN: On behalf of my client, I'm sure he thanks the Court.

THE COURT: Well, I think you should thank all these people.

MR. CURRAN: And thank counsel.

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THE COURT: Who have been here working very diligently to come to some sort of arrangement, and they have agreed to this, and that is the order of the Court.

MR. CURRAN: Thank you, Your Honor.

THE COURT: Yes, sir.

Well, all right, it's now 10 o'clock. Do we need to get this order in the hands of the U.S. marshal tonight?

MS. VAN HEUGTEN: Your Honor, I believe that we definitely need to do that in order to have the vessel released tonight.

THE COURT: Okay. Okay. All right.

MS. VAN HEUGTEN: I would like to be excused for a moment so we can contact the agent so we can get everything else lined up.

THE COURT: What have we got here?

THE LAW CLERK: I called every number there. There is nobody up there. I left the numbers for them to call us on their answering service.

THE COURT: Maybe what we better do is stand at ease and I'll go call the U. S. Marshal at home.

(Proceedings on the record concluded)

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

I, June Simon, Official Court Reporter, United States District Court, Southern District of Texas, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that I reported the proceedings had in the above-styled and numbered cause on 1-10-86; that a transcript of said proceedings was later reduced to typewriting by me or under my personal supervision, and the above and foregoing 15 pages constitutes a true and correct transcript thereof.

Given Under My Official hand, this the 28th day of April, 1986.

/s/ JUNE SIMON
June Simon

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-86-103

REX OIL, LTD. and EMPIRE PETROLEUM INTERNATIONAL, INC.	*
Plaintiffs	*
V.	*
A/S KOSMOS, TRANSOIL (JERSEY) LTD., TRANSOIL U.S.A. INC., ARCO CHEMICAL COMPANY and BANQUE DE PARIS ET DES PAYS BAS (Suisse) S.A.	*
Defendants	*

FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

The complaint of REX OIL, LTD. and EMPIRE PETROLEUM INTERNATIONAL, INC. against A/S KOSMOS, TRANSOIL (JERSEY) LTD., TRANSOIL U.S.A., INC., ARCO CHEMICAL COMPANY and BANQUE DE PARIS ET DES PAYS BAS (SUISSE) S.A. in personam, in a breach

of a maritime contract, breach of contract, fraud, wrongful dishonor of a negotiable instrument, tortious interference with legal contract, the same being an admiralty or

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maritime claim within the meaning of Rule 9(h), and arising under an Act of Congress being ancillary and pendent thereto, alleges on information and belief as follows:

I.

At all times hereinafter mentioned, plaintiff, REX OIL, LTD. (hereinafter "REX") was and now is a corporation or other business entity, havings its principal office and place of business in a foreign country, and is doing business in the United States.

At all time hereinafter mentioned, plaintiff, EMPIRE PETROLEUM INTERNATIONAL, INC. (hereinafter "Empire") was and now is a corporation or other business entity, having an office and place of business at 258 Elm Street, New Canaan, Ct. 06840.

II.

Defendant TRANSOIL (JERSEY) LTD., is a foreign corporation with its principal place of business other than the State of Texas. Defendant Transoil U.S.A. Inc., is a foreign corporation with its principal place of business in a place other than the State of Texas. Both Defendants can be served in care of their Agent Seagulf Maritime, Inc., at 806 Waugh Drive, Houston, Texas 77019.

Defendant BANQUE DE PARIS ET DES PAY BAS (Suisse) S.A., (hereinafter "PARIBAS") is a foreign corporation or similar entity engaged in international banking with its principal place of business

in a place other than the State of Texas and can be served at 6, Rue du Hollande, 1211 Geneva 11, Switzerland. By entering into a contract calling for performance, in part or in whole, in the State of Texas, said defendant is doing business in the State of Texas, and Plaintiff's cause arises out of said contract, and by equitable principals of law. PARIBAS, by doing business with the State of Texas, has appointed the Secretary of the State of Texas as agent for service of process.

FIRST CAUSE OF ACTION

III.

Plaintiffs incorporate and reiterate as fully as if copied here plaintiffs original complaint, as to all allegations made against TRANSOIL (JERSEY) LTD., TRANSOIL (U.S.A.) INC., A/S KOSMOS and ARCO CHEMICAL COMPANY.

SECOND CAUSE OF ACTION

IV.

On November 28, 1985, Defendant PARIBAS entered into a contract with Plaintffs by issuing an irrevocable Letter of Credit, No. 53.750/C4, at the request of its client TRANSOIL, to purchase a certain quantity of distillate blend stock, then located at PAKTANK Terminal, Deer Park, Texas, and owned by ARCO CHEMICAL COMPANY.

V.

Plaintiffs were beneficiaries under said letter, and satisfied all obligations required under the terms of the Letter of Credit, as amended, and as further amended by agreement before this Court on January 10, 1986.

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VI.

On February 14, 1986, agents of Plaintiffs presented a clean set of documents, conforming to the terms of the

Court Amended Letter of Credit, and demanded payment in the amount of ONE MILLION TWO HUNDRED FORTY THOUSAND ($1,240,000.00) Dollars. PARIBAS joined with and intervening on behalf of itself and/or its customer, TRANSOIL, has refused to make payment, although legally obligated to do so under not only said Court Order but also both by the laws of the State of Texas and laws incorporated into the terms of the Letter of Credit. There is no basis on which to refuse payment, and the actions described above constitute a wrongful dishonor of the documents and a breach of the contract.

VII.

As a result of the above described actions, Plaintiffs have suffered damages, of not only $1,240,000.00, plus interest at the legal rate from February 14, 1986 and reasonable attorneys fees made necessary by the wrongful dishonor and breach, but also extra handling, storage

and other charges incurred by Plaintiffs in mitigating damage. Defendants are liable jointly and/or severally to Plaintiffs for these amounts, and Plaintiffs specifically reserve the right to later amend and prove damages.

THIRD CAUSE OF ACTION

VIII.

The above described actions of each Defendant has prevented Plaintiffs from completing other contractual obligations of Plaintiffs. As a result of this intentional tortious interference

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with Plaintiffs contract, Plaintiffs have suffered damages including loss of profit, loss of use of capital, legal expenses, loss of goodwill and may be subject to legal action for failure to complete their contracts. Although such damages cannot be fully determined, and Plaintiffs reserve the right to further claim damages and to claim punitive damages, such

damages are at least SEVEN HUNDRED FIFTY THOUSAND ($750,000.00) Dollars, for which Defendants are liable, jointly and/or severally, to Plaintiffs.

FOURTH CAUSE OF ACTION

IX.

Defendants' TRANSOIL and PARIBAS joint actions in this matter were performed with the intent to defraud Plaintiffs of the value of the Letter of Credit and/or goods, and were additional to an earlier attempt to fraudulently obtain payment of a standby Letter of Credit established by EMPIRE, in favor of TRANSOIL, to secure EMPIRE'S performance, in the amount of TWO HUNDRED THIRTY FIVE THOUSAND ($235,000.00) Dollars.

X.

As a result of Defendants fraud, Plaintiffs have suffered actual damages in excess of ONE MILLION FIVE HUNDRED THOUSAND ($1,500,000.00) Dollars, plus interest. Defendants are liable to

Plaintiffs in that amount, plus exemplary damages as a result of Defendants fraudulent intent.

FIFTH CAUSE OF ACTION

XI.

Defendants TRANSOIL and PARIBAS were admittedly acting in concert during the events herein described, as can be seen by telex dated

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March 7, 1986, annexed hereto and said actions amounted to a willful and knowing breach of warranty, was an unconsionable course of action and/or was a false, misleading and deceptive trade practice in violation of the Texas Deceptive Trade Practices - Consumer Protection Act.

XII.

Plaintiffs are entitled to their actual damages as a result of said actions, and are entitled to double and treble damages in accordance with said act.

XIII.

Although more than 30 days has elapsed since Plaintiffs have demanded payment, Defendants have refused to make payment. As a result of said refusal, Plaintiffs have been forced to retain the services of an attorney and have incurred atorneys fees that are necessary to collect this debt. Under Texas law, Plaintiffs are entitled to recover their attorneys fees and costs.

WHEREFORE PLAINTIFFS pray for judgment against all defendants with actual damages, doubled or trebled in accordance with the law, together with interest, costs and attorneys fees, and

such other and further relief as this Court deems fair and just.

Respectfully submitted,

/s/_____
Jack P. Thetford, Jr.
Attorney in Charge for Plaintiffs
3100 Edloe, Suite 306
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OF COUNSEL:
RYNIKER & THETFORD

[EXCLUSIVE OF EXHIBITS AND VERIFICATIONS]